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Proposal for a Directive on the Freezing and confiscation of proceeds of crime in the EU

Introduction

The role of asset recovery has been acknowledged at the EU level as an integral part in the fight against serious and organised cross-border crime. For example, the Stockholm Programme calls the Member States and the Commission to make the confiscation of assets more effective and to strengthen cooperation between Member State Asset Recovery Offices (AROs).¹

Criminal groups can amass huge profits from their varied criminal activities and markets, and it is generally agreed that disrupting and recovering financial flows of a criminal group is an efficient way to stop crime from paying. The fact that crime is often perpetrated in one Member State and the relevant proceeds are transferred into another make it increasingly challenging for law enforcement and judicial authorities to fight cross-border crime successfully.

In line with this, the Commission Communication "An Internal Security Strategy in Action"² as well as an own initiative report on organised crime by the European Parliament adopted in October 2011³ called for the Commission to propose new legislation on confiscation.

On 13 March 2012 the Commission submitted to the European Parliament and to the Council a proposal for a Directive of the European Parliament and of the Council on the freezing and confiscation of proceeds of crime in the European Union⁴.

¹ "An open and secure Europe serving and protecting the citizens", 17024/09.

² COM(2010) 673 final of 22.11.2010.

³ European Parliament Report on organised crime in the European Union, adopted on 25 October 2011, Document INI/2010/2309.

⁴ 7641/12 DROIPE 29 COPEN 57 CODEC 656 + ADD 1 +ADD 2

The draft Directive aims to strengthen the systems for freezing, managing and confiscating criminal assets across the EU. In this context, the draft Directive lays down minimum rules for the freezing and confiscation of criminal assets through direct confiscation, value confiscation, extended confiscation, non-conviction based confiscation (in limited circumstances), and third-party confiscation.

A. Non-conviction based confiscation

Non-conviction based procedures allow to freeze and confiscate an asset irrespective of a prior conviction of its owner in a criminal court. Non-conviction based confiscation has been discussed on various European and international fora as a valuable tool in the effective fight against cross-border serious crime⁵.

Currently there are systems in place in a number of Member States for non-conviction based confiscation. Some of the systems require a link to criminal proceedings, others apply civil forfeiture proceedings without any link to a criminal case.

The Commission proposal introduces provisions on non-conviction based confiscation in limited circumstances under Art. 5, with a view to addressing cases where criminal prosecution cannot be exercised or cannot be exercised further, i.e. in circumstances where a criminal conviction cannot be obtained because the suspect has died, is permanently ill, or when his flight or illness prevents effective prosecution within a reasonable time. It thus concerns confiscation in relation to criminal proceedings, but aims at allowing the Member States to choose whether confiscation should be imposed by criminal and/or civil/administrative courts.

A timely solution regarding non-conviction based confiscation is paramount to demonstrate a clear political commitment to providing an effective and comprehensive framework supporting the policy objective that crime must not pay. The Commission proposal has created a momentum to engage in a concrete discussion at the EU level on the topic of non-conviction based confiscation.

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Cf. Council of Europe (CoE) Convention on Laundering, Search, Seizure and Confiscation of the proceeds from Crime, United Nations Convention Against Corruption (UNCAC), OECD Financial Action Task Force (FATF), and G8 Lyon-Rome Group.

Discussion points

1. Would Ministers confirm their support to the introduction of the concept of non-conviction based confiscation at the EU level?

2. How could this objective be best achieved in an EU approach for non-conviction based confiscation?

B. Safeguards

It is stemming from the principles enshrined in ECHR and the Charter of Fundamental Rights of the EU that the objectives of effective freezing and confiscation procedures should be complemented and balanced off by effective guarantees and sufficient procedural safeguards in order to protect the legitimate rights of persons affected by the freezing or confiscation order.

Further to a general safeguard clause on effective judicial remedies, the Commission proposal foresees specific safeguards for the affected persons in Art. 8 of the draft Directive. They include *inter alia* the right of the person whose property is subject of a non-conviction based confiscation to be represented by a lawyer, as well as specific procedural rights in cases of third party confiscation, such as the right to be informed of the proceedings, right to be heard, right to ask questions and to provide evidence.

Discussion point

Should a safeguard system linked to freezing and confiscation procedures, as provided in the Commission proposal include specific procedural safeguards?
